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SUMMARY

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Supreme Court Recognition of Fifth Amendment Protection for Acts of Production

On several occasions the Supreme Court has addressed the question of when Fifth Amendment privilege against self-incrimination applies to the act of responding to a government subpoena or other command. Beginning with *Schmerber* and *Fisher*, through *Doe*, and finishing with *Hubbell*, the Court has declared that acts of production may fall within the privilege when they are personal, compelled, incriminating, testimonial communications.

The act of production doctrine is easily misunderstood, but some of the uncertainty can be dissipated by a close examination of the facts and views of the Court in the cases where the issue has arisen. The cases reveal that: An act of production is not privileged when it is done voluntarily. It is not privileged to the extent that it involves sample-taking from an individual rather than some act which requires the individual to exercise his cognitive faculties. It is not privileged to the extent that the act is performed as representatives of a corporation or other collective entity. It does not preclude disclosures required for participation in a regulatory scheme.

The cases also explain that an act of production may be privileged as a testimonial communication when, with respect to the items sought, it implicitly concedes their existence, identifies them, evidences possession of or control over them, discloses their location, or vouches for their authenticity. The two cases where the privilege was successfully claimed involved general, sweeping demands, characterized by the courts as governmental fishing expeditions, that made the individual to whom they were addressed a strong, and perhaps even indispensable witness against himself. Both cases involved sweeping subpoenas which demanded that the individuals engage in the mental exercise of identifying, collecting, and organizing documents that incriminated them or that led to incriminating evidence.

This report is available in an abridged form without its footnotes as CRS Report RS21701, *A Sketch of Supreme Court Recognition of Fifth Amendment Protection for Acts of Production*.

Contents

Contacts

Introduction

The Fifth Amendment to the United States Constitution declares in pertinent part that, "No person . . . shall be compelled in any criminal case to be a witness against himself." The United States Supreme Court has pointed that acts of production may fall within of the Fifth Amendment privilege against self-incrimination under some circumstances. To do so they must satisfy the privilege's general demands that require a (1) personal, (2) governmentally compelled, (3) incriminating, (4) testimonial, (5) communication.

The act of production doctrine is easily misunderstood for a number reasons. First, the protected communication is most often implicit. The privilege covers an individual's actions rather than his speech or writing, yet many incriminating actions such as providing a blood sample or a handwriting sample are ordinarily not protected because they are not testimonial. Second, no bright line divides communications that are testimonial from those that are not. Third, the privilege sometimes protects the act of producing existing documents which by themselves are not protected because they were originally prepared voluntarily. Fourth, the privilege protects not only intrinsically incriminating communications but also those that form a link in the chain of incrimination. Some of the uncertainty can be dissipated by a close examination of the facts and views of the Court in the cases where the issue has arisen.

Schmerber and *Fisher*

Schmerber

The act of production doctrine first comes into focus in two cases in which the Court rejected its application, *Schmerber v. California*, 384 U.S. 757 (1966), and *Fisher v. United States*, 425 U.S. 391 (1976). *Schmerber* is a blood alcohol case. Schmerber had claimed a privilege against self-incrimination in an effort to bar the results of his blood alcohol test, conducted over his objections, following a serious traffic accident.

The Court was unconvinced. It repeated Justice Holmes' reminder that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it is material," 384 U.S. at 763, quoting, *Holt v. United States*, 218 U.S. 245, 252-53 (1910). Schmerber's claim was fatally defective, "since the blood test evidence, although an incriminating product of compulsion, was neither [Schmerber's] testimony nor *evidence relating to some communicative act or writing by [him]*," 384 U.S. at 765 (emphasis added).

Fisher

Although no more beneficial to its claimants, the act of production doctrine became clearer with *Fisher*. Fisher invoked the privilege in response to an Internal Revenue Service demand served on his attorney for documents prepared by Fisher's accountant. The accountant's papers had been prepared voluntarily and consequently lacked the element of government coercion required for application of the privilege. The content of the papers aside, the "act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own," the Court pointed out. "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena," 425 U.S. at 410.

Unfortunately for Fisher his act of production came up short on two other elements. It was neither incriminating nor testimonial. Implicit assertions of the existence and control of accountant's papers relating to one's taxes are by themselves hardly self-criminating. For, "surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver to the taxpayer," 425 U.S. at 412. Neither did the Court consider Fisher criminally imperilled by any implicit authentication of the papers. For, "production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. . . . The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible against the taxpayer without authenticating testimony." 425 U.S. at 412-13.

In *Fisher* and elsewhere, the testimonial element turns on whether production asserts the existence, control or authentication of an item and on the extent to which an individual's implicit evidentiary assertion relieves the prosecution of burden it might otherwise find difficult to bear. In *Fisher*, the Court considered "[i]t doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. . . . Surely, the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents. 8 Wigmore §2264, p.380. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers," 425 U.S. at 412-13.[1]

Fisher's authentication argument proved no more robust. As the Court observed in the context of the incrimination element, Fisher "did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible against [him] without [independent] authenticating testimony." 425 U.S. at 413.

Doe (I): The Privilege Applies

Finally in *United States v. Doe (Doe I)*, 465 U.S. 605 (1984), the Court encountered a case where the act of production doctrine was appropriately claimed. A federal grand jury investigating possible corruption relating to municipal contracts served a sweeping series of five subpoenas upon Doe demanding production of business records of five sole proprietorships under which Doe apparently did business.[2] The lower courts held that Doe's privilege against self-

[1] Dean Wigmore had written that, "the production of *documents* or *chattels* by a person (whether ordinary witness or party witness) in response to a subpoena, or to a motion to order production, or to other forms of *process relying on his moral responsibility for truthtelling*, may be refused under the protection of the privilege. This is universally conceded. For though the documents or chattels thus sought be not oral in form, and though they be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to process, still there is a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort – authenticating or vouching for pre-existing chattels – are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection. Furthermore, it follows that documents or chattels obtained from the person's control *without* the use against him of process relying on his truth-telling is *not* within the scope of the privilege," 8 WIGMORE ON EVIDENCE, §2264, at 363-64 (1940 ed.)(at 379-80 (1961 ed.)) (emphasis in the original).

[2] The Court described the five subpoenas as follows: "The first two demanded the production of the telephone records of several of respondent's companies and all records pertaining to four bank accounts of respondent and his companies. The subpoenas were limited to the period between January 1, 1977 and the dates of the subpoenas. The third subpoena demanded the production of a list of virtually all the business records of one of respondent's companies for the period between January 1, 1976, and the date of the subpoena. [The categories of records sought by the third subpoena were:

incrimination shielded him from punishment for failure to produce the subpoenaed documents. The trial court declared that, "With few exceptions, enforcement of the subpoenas would compel [Doe] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [Doe's] Fifth Amendment rights . . . . The government argues that the existence, possession and authenticity of the documents can be proved without [Doe's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings," 465 U.S. at 613, quoting, *In re Grand Jury Empanelled March 19, 1980*, 541 F.Supp.1, 3 (D.N.J. 1981).

The Court of Appeals concurred, adding that, "we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist – or that the appellee even is somehow connected to the business entities under investigation – is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself," 465 U.S. at 613, quoting, *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982).

The Supreme Court agreed. In fact, it declined to conduct an independent analysis of whether Doe had established the testimonial and incrimination elements of his claim. It simply deferred to the District Court's finding, affirmed by the Third Circuit, that compliance with the subpoenas "would involve testimonial self-incrimination," 465 U.S. at 613.

When the Privilege Does Not Apply

There followed in fairly rapid succession three cases in which the Court confirmed the vitality of the action of production doctrine but found its benefits beyond the reach of the claimants before it.

Braswell: Collective Entities

In *Braswell v. United States*, 487 U.S. 99 (1988), the Court held that the president and sole shareholder of a corporation could not interpose the act of production to avoid the commands of a grand jury subpoena for corporate records, even if their *contents* would incriminate him, 487 U.S.

1) general ledgers; 2) general journals; 3) cash disbursement journals; 4) petty cash books and vouchers; 5) purchase journals; 6) vouchers; 7) paid bills; 8) invoices; 9) cash receipts journal; 10) billings; 11) bank statements; 12) canceled checks and check stubs; 13) payroll records; 14) contracts and copies of contracts, including all retainer agreements; 15) financial statements; 16) bank deposit tickets; 17) retained copies of partnership income tax returns; 18) retained copies of payroll tax returns; 19) accounts payable ledger; 20) accounts receivable ledger; 21) telephone company statement of calls and telegrams, and all telephone toll slips; 22) records of all escrow, trust, or fiduciary accounts maintained on behalf of clients; 23) safe deposit box records; 24) records of all purchases and sales of all stocks and bonds; 25) names and home addresses of all partners, associates, and employees; 26) W-2 forms of each partner, associate, and employee; 27) workpapers; and 28) copies of tax returns.] The fourth subpoena sought production of a similar list of business records belonging to another company. [The only documents requested in the fourth subpoena that were not requested in the third were the company's stock transfer book, any corporate minutes, the corporate charter, all correspondence and memoranda, and all bids, bid bonds, and contracts. The request for 'corporate' minutes and the 'corporate' charter is puzzling because the company named in the subpoena was an unincorporated sole proprietorship.] The final subpoena demanded production of all bank statements and canceled checks of two of respondent's companies that had accounts at a bank in the Grand Cayman Islands," 465 U.S. at 606-7 (footnotes 1 and 2 of the opinion in brackets).

at 102. Corporations and other "collective entities" like partnerships or labor organizations enjoy no privilege against self-incrimination, 487 U.S. at 107-8. The privilege stands as no impediment to demands for their records addressed to their custodial representatives, although the act of production may afford the custodial individual protection.[3]

Doe (II): Consent Forms

In *Doe v. United States (Doe II)*, 487 U.S. 201 (1988), the Court encountered a situation akin to *Schmerber* when Doe's signature was taken from him over his objections. Doe contested a court order that directed him to sign a form authorizing any bank in the Cayman Islands or Bermuda to disclose to the grand jury information concerning any accounts Doe might have in any of the banks. Using the words once again of Dean Wigmore, the Court declared that, "Unless some attempt is made to secure a communication – written, oral or otherwise – upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one" and consequently outside the privilege, 487 U.S. at 211, *quoting*, 8 WIGMORE ON EVIDENCE §2265, at 386 (1961 ed.)[at 375 (1940 ed.)].

In *Doe II*, the execution of the form "is analogous to the production of a handwriting sample or voice exemplar: it is a nontestimonial act. In neither case is the suspect's action compelled to obtain any knowledge he might have," at 217. Moreover, "[b]y signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over such account. Nor would his execution of the form admit the authenticity of any records produced by the bank," 215-16.

[3] "Although a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity. Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the 'individual act' against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian. The Government has the right, however, to use the corporation's act of production against the custodian. The Government may offer testimony – for example, from the process server who delivered the subpoena and from the individual who received the records – establishing that the corporation produced the records subpoenaed. The jury may draw from the corporation's act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena. And if the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents. Because the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in the case. [We reject the suggestion that the limitation on the evidentiary use of the custodian's act of production is the equivalent of constructive use immunity barred under our decision in Doe, 465 U.S., at 616-617. Rather, the limitation is a necessary concomitant of the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his representative capacity.

"We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.]

"Consistent with our precedent, the United States Court of Appeals for the Fifth Circuit ruled that petitioner could not resist the subpoena for corporate documents on the ground that the act of production might tend to incriminate him. The judgment is therefore Affirmed." 487 U.S. at 117-19 (footnote 11 of the opinion in brackets).

Bouknight: Required Reports

In *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), Bouknight had maintained custody of her child subject to supervisory restrictions imposed as consequence of serious child abuse, but was held in contempt for failure to produce the child at a custody hearing. The Supreme Court denied her claim of the act of production as defense, confirming that the act of production does not excuse otherwise required compliance with a regulatory scheme, 493 U.S. at 555-56, although it may curtail the government's ability to use compliance for prosecutorial purposes.[4]

Hubbell: A Second Application

Most recently, the Court found the act of production applicable notwithstanding the fact the witness had been granted immunity, *United States v. Hubbell*, 530 U.S. 27 (2000). In *Doe I*, the Court took special note of the government's failure to secure statutory immunity in the face of an act of production claim;[5] in *Hubbell* the government secured a statutory immunity order that required Hubbell to surrender the subpoenaed documents, but that necessarily guaranteed that their production would not be used directly or indirectly to incriminate him.

Hubbell had entered a plea agreement under which he pled guilty to tax evasion and fraud and promised to fully cooperate with the Independent Counsel's Whitewater investigation. Concerned that Hubbell was not being completely candid, the Independent Counsel served him with a far reaching grand jury subpoena.[6]

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[4] "We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent proceedings. But we note that imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony. See *Braswell*, 487 U.S. at 118 and n.11," 493 U.S. at 561.

[5] "The Government, as it concedes, could have compelled respondent to produce the documents listed in the subpoena. Sections 6002 and 6003 of Title 18 provide for the granting of use immunity with respect to the potentially incriminating evidence. . . . The Government did state several times before the District Court, that it would not use respondent's act of production against him in any way. But counsel for the Government never made a statutory request to the District Court to grant respondent use immunity. [Despite repeated questioning at oral argument, counsel for the Government gave no plausible explanation for the failure to request official use immunity rather than promising that the act of producing the documents would not be used against respondent.] We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires," 465 U.S. at 614-16 (footnote 15 of the opinion in brackets).

[6] "On October 31, 1996, upon application by the Independent Counsel, a subpoena was issued commanding [Hubbell] to appear and testify before the grand jury of the United States District Court for the Eastern District of Arkansas on November 19, 1996, and to bring with him various documents described in a 'Subpoena Rider' as follows:

"A. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to the identity of employers or clients of legal or any other type of work.

"B. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money of other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, and/or bills for work performed or time billed from January 1, 1993 to the present.

"C. Copies of all bank records of Webster Hubbell, his wife, or children for all accounts from January 1, 1993 to the present, including but not limited to all statements, registers and ledgers, cancelled checks, deposit items, and wire transfers.

"D. Any and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell from January

Hubbell responded by asserting his privilege against self-incrimination and was made the subject of a statutory use immunity order. The documents he subsequently supplied and evidence derived from them resulted in his prosecution for crimes apparently unrelated to either his first conviction or Whitewater. The District Court described the government's effort as a "quintessential fishing expedition," and dismissed the indictment, 530 U.S. at 32, *quoting, United States v. Hubbell*, 11 F.Supp.2d 25, 37 (D.D.C. 1998). The Supreme Court essentially agreed.

Content aside, the mental exercise required for Hubbell to gather, sort, and organize the thousands of pages of documents, which he then testified fully complied with the subpoena's demand (other than for a documents privileged on other grounds), handed the prosecution a road map to crimes about which until then it was clueless.[7]

1, 1993 to the present, including but not limited to original time sheets, books, notes, papers, and/or computer records.

"E. Any and all documents reflecting, referring, or relating to expenses incurred by and/or disbursements of money by Webster Hubbell during the course of any work performed or to be performed by Mr. Hubbell from January 1, 1993 to the present.

"F. Any and all documents reflecting, referring, or relating to Webster Hubbell's schedule of activities, including but not limited to any and all calendars, day-timers, time books, appointment books, diaries, records of reverse telephone toll calls, credit card calls, telephone message slips, logs, other telephone records, minutes, databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities from January 1, 1993 to the present.

"G. Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of Webster Hubbell, his wife, or his children from January 1, 1993 to the present.

"H. Any and all tax returns and tax return information, including but not limited to all W-2s, form 1099s, schedules, draft returns, work papers, and backup documents filed, created or held by or on behalf of Webster Hubbell, his wife, his children, and/or any business in which he, his wife, or his children holds or has held an interest, for the tax years 1993 to the present.

"I. Any and all documents reflecting, referring, or relating to work performed or to be performed or on behalf of the City of Los Angeles, California, the Los Angeles Department of Airports or any other Los Angeles municipal Governmental entity, Mary Leslie, and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

"J. Any and all documents reflecting, referring, or relating to work performed or to be performed by Webster Hubbell, his wife, or his children on the recommendation, counsel or other influence of Mary Leslie and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

"K. Any and all documents related to work performed or to be performed for or on behalf of Lippo Ltd. (formerly Public Finance (H.K.) Ltd.), the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Luen Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary, or corporation owned or controlled by or related to the aforementioned entities or individuals, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions," 530 U.S. at 46-9.

[7] A critical component of the Court's analysis – and the key to the distinction between the contents of documents which are not privileged and the act of their production which is –- lies in the realization that the privilege protects not only incriminating communications but communications that form a link, perhaps even the first link, in the chain that leads to incrimination: "It has, however, long been settled that [Fifth Amendment's] protection encompasses compelled

In doing so, the Court felt Hubbell had become an essential or at least valuable witness against himself within the understanding of the Fifth Amendment:

> What the District Court characterized as a "fishing expedition" did produce a fish, but not the one that the Independent Counsel expected to hook. It is abundantly clear that the testimonial aspect of [Hubbell's] act of producing subpoenaed documents was the first step in a chain of evidence that led to his prosecution. The documents did not magically appear in the prosecutor's office like "manna from heaven." They arrived there only after [Hubbell] asserted his constitution privilege, received a grant of immunity, and . . . took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through [Hubbell's] truthful reply to the subpoena that the Government received the incriminating documents of which it made substantial use in the investigation that led to the indictment.
>
> . . . It was unquestionably necessary for [Hubbell] to make extensive use of the contents of his own mind in identifying the hundreds of documents responsive to the request in the subpoena. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. The Government's anemic view of [Hubbell's] act of production as a mere physical act that is principally nontestimonial in character and can be entirely divorced from its implicit testimonial aspect so as to constitute a legitimate, wholly independent source . . . for the documents produced simply fails to account for these realities. 530 U.S. at 43.
>
> The Independent Counsel argued to no avail that like the *Fisher* tax records, the existence of the *Hubbell* business and tax documents should be considered a "foregone conclusion" and therefore the act of revealing their existence lacked testimonial weight. The Court simply considered *Doe I*, with its sweeping, minimally particularized commands, a more apt comparison.[8]

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statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. . . 'The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," 530 U.S. at 38, *quoting, Hoffman v. United States*, 341 U.S. 479, 486 (1951). The act of production can in some instances, as in *Hubbell*, reveal the existence and location of unknown depositories of incriminating evidence that come within the privilege derivatively even though the fact of their location and existence alone is not incriminating.

[8] "Whatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent. The Government cannot cure this deficiency through the overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena. The *Doe* subpoenas also sought several broad categories of general business records, yet we upheld the District Court's finding that the act of producing those records would involve testimonial self-incrimination," 530 U.S. at 44-45.

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